Case No: CO/5544/2014

Neutral Citation Number: [2018] EWHC 695 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2018

Before :

MR JUSTICE GREEN

- -

Between :

THE QUEEN (on the application of Shirley Archer and William Archer)	**Claimant**
- and -	
HER MAJESTY'S REVENUE AND CUSTOMS	**Defendant**

- -
- -

Conrad McDonnell (instructed by **KPMG LLP**) for the **Claimant**
David Yates (instructed by **HMRC Solicitor's Office**) for the **Defendant**

Hearing dates: 6th March 2018

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Judgment

MR JUSTICE GREEN:

A. Introduction

1. There is before the court an appeal against the decision of Master Gidden of the 12th June 2017 relating to costs. The Appellant had commenced judicial review proceedings against the Commissioners for HM Revenue and Customs ("HMRC"). That claim was compromised in the Appellant's favour. However, the Master concluded that there should be no order for costs upon the basis that the claim for judicial review was premature because the Appellant had failed to exploit the statutory right to make representations to HMRC which exists under section 222 Finance Act 2014 ("FA 2014") and which could and almost certainly would have led to resolution of the dispute.

2. The present appeal turns, in substance, upon the correctness of the conclusion of the Master to this effect. Mr McDonnell for the Appellant argues that the issue arising is a discrete issue of principle; Mr Yates for HMRC accepts that there is a point of principle arising but adds that at base the Master's decision was premised upon his condemnation of the litigation conduct of the Appellant and as such is fact sensitive and based upon the exercise of judgment, which this court, on appeal, should be loath to interfere with.

3. For reasons that I set out below I am of the conclusion that the ruling of the Master was based primarily upon his conclusion that the Claim for judicial review was premature and, as to this, I agree with the Master. In so far as his ruling is based upon conclusions about the conduct of the Appellant then this was secondary but, nonetheless, amounts to an exercise of discretion which on appeal I would not wish to disturb.

4. I would record my gratitude to both counsel for their focused and thoughtful written and oral submissions. These showed that whilst at first blush the issue might appear straightforward even light excavation reveals a series of complications which flow from the analysis. I have therefore endeavoured to stay within the confines of the facts of the case. However there is at the heart of this case a point of broader significance and I have set out my views on this below. I have also identified other issues that I refrain from expressing a decided view upon. These can be explored in other cases where the facts are more clearly on point.

5. My end conclusion is that the Master did not err. He correctly concluded that it was premature to commence judicial review proceedings pending the exercise of the statutory right to make representations and a decision thereupon by HMRC. Accordingly, there is no basis for overturning his decision on costs.

B. The relevant facts

6. The facts are complex. I summarise them as follows. During 2006 the Appellant's husband, Mr Archer, had participated in a tax avoidance scheme which resulted in him claiming an income tax loss pursuant to section 551 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"). He filed a tax return for 2005/06 declaring

income tax payable by him which was, in consequence of the scheme, reduced by circa £6,000,000 than would otherwise have been the case. His tax advisors had disclosed the scheme to HMRC pursuant to the Disclosure of Tax Avoidance Schemes Regulations ("DOTAS"), as they were required by law to do. HMRC had given the scheme a reference number pursuant to the Regulations. Mr Archer duly provided that reference number to HMRC in his return thereby alerting and notifying HMRC that his liability could be subject to the assessment that HMRC might make as to the effectiveness of the notified scheme.

7. The scheme can be summarised (at the risk of over-simplification) in the following way. Mr Archer sold Certificates of Deposit ("CDs") at a loss to a third-party bank. This was achieved in three discreet steps. First, Mr Archer granted to his wife an option to purchase the CDs from him at an undervalue. Second, Mrs Archer sold the option to the bank it being of value since it conferred the right to acquire the CDs at below market price. Third, the bank exercised the option. The Appellant analyses the situation in the following way: the acquisition by Mrs Archer of the option and its sale created a liability to capital gains tax unless it was exempt. Under normal capital gains tax rules a gain on the sale of an option relating to CDs was exempt from tax since a gain made in relation to CDs would be exempt from capital gains tax. The correctness of that capital gains tax analysis was in issue between the taxpayer and HMRC at the material times in 2014, but has subsequently been resolved for practical purposes by an agreement reached between the parties pursuant to s.54 Taxes Management Act 1970.

8. This tax avoidance scheme was investigated by HMRC over the course of a number of years. On the 22nd September 2011 HMRC concluded that the scheme was effective and that the losses claimed were accordingly permissible and on that date HMRC communicated with Mr Archer's advisors, KPMG, their decision not to pursue further arguments in respect of Mr Archer's claimed loss under Section 551 ITTOIA.

9. In the same letter, however, HMRC stated that they considered that Mrs Archer had approximately £6,000,000 of capital gains tax to pay for 2005/06 in consequence of her participation in the tax avoidance scheme entered into by Mr Archer. Mrs Archer, the Appellant in the present proceedings, had not claimed any tax advantage for herself pursuant to the scheme *but* she had been a counterparty to transactions concluded by Mr Archer.

10. As of 2011 the position of HMRC was that Mr Archer had no further tax to pay for 2005/06 but, instead, Mrs Archer was liable to pay £6,000,000 in capital gains tax.

11. On the 27th March 2013 HMRC wrote to KPMG to summarise the position: HMRC confirmed that it had already accepted the loss arising on Mr Archer so "…*the dispute is now solely on the tax effect on Mrs Archer*." The position adopted by HMRC was that there was *a* liability. It was that of either Mr or Mrs Archer; but not both.

12. Subsequently, on 11th July 2013 HMRC, in a telephone call with KPMG, indicated that they had changed their position in relation to the efficacy of the scheme and that they no longer accepted Mr Archer had a loss for 2005/06.

13. On the 30th July 2014 various Commissioners of HMRC met to consider a formal settlement proposal submitted by Mr Archer. His proposal involved neither Mr Archer nor Mrs Archer paying additional tax for 2005/06. That proposal was rejected. However, the Commissioners indicated that they would accept a proposal pursuant to which Mr Archer conceded his loss for 2005/06 and in return, HMRC would not pursue capital gains tax from Mrs Archer.

14. On the 22nd August 2014 a letter was sent by HMRC to Mr Archer which indicated that an accelerated payment notice ("APN") would be shortly issued to him (see below for a brief explanation of the APN system). That APN was issued on the 19th September 2014.

15. Also, on the 19th September 2014 a letter was sent by HMRC to the Appellant indicating that an APN would shortly be issued to her. That APN was issued on the 4th November 2014.

16. The position now reflected in these communications was that HMRC was intent on seeking payment from both Mr and Mrs Archer.

17. On the 28th November 2014 a letter on behalf of the Appellant and Mr Archer (said to amount to a Pre-Action Protocol letter) was sent to HMRC. A Claim Form was issued by Mr and Mrs Archer on the same day. It was served on HMRC on the 2nd December 2014.

18. On the 17th December 2014 statutory representations under section 222 FA 2014 were made to HMRC on behalf of the Appellant and Mr Archer. These incorporated by cross-reference all of the grounds and arguments advanced in the judicial review. The representations included the following:

> "The purpose of this letter is to make representations under section 222 of the Finance Act 2014 as we consider that HMRC should withdraw the APNs, using the power to do so in sections 222(4) and 227 Finance Act or otherwise. In the case of Mrs Archer, the representations are made under section 222(2)(a) on the basis that none of Conditions A, B or C in section 219 is met in respect of her APN. In the case of Mr and Mrs Archer, the representations are made under section 222(2)(b) on the basis of objecting to the amount specified under section 220(2)(b).
>
> Our representations are made on the same basis as the application for the judicial review Case Number CO/5544/2014, namely that we consider the APNs to have been issued without HMRC having power lawfully to do so, and we append a copy of the sealed Claim Form, statement of facts and detailed statement of grounds for ease of reference.
>
> We put you on notice that should HMRC wish to confirm that APNs under section 220(2), we have our clients' instructions to apply for interim relief in the judicial review proceedings to restrain this course of action.

> As an alternative to expensive and protracted judicial review proceedings, our clients propose that following these representations, the parties agree that there be a stay on proceedings provided that HMRC does not confirm the APNs under section 220(4) or at all (such that they do not become payable) and issues a closure notice so that an appeal could be made to the First Tier Tribunal without any further delay."

19. Whether due to the issuance of proceedings or the letter of representations or both HMRC altered its position. On 22nd December 2014 HMRC wrote to KPMG, informing them that it had decided to withdraw the APN issued to Mrs Archer on 4th November 2014 for the year ending 5th April 2006. The reasons for that decision were articulated in the following way:

> "Where both spouses play a part in avoidance arrangements, as in the case of your clients, best practice requires that all the circumstances of those arrangements including the involvement of both spouses should be considered before approval is given to the issuing of notices to both. In this case, my clients regret that best practice was not followed. Having now considered all the circumstances of your client's arrangement, HMRC have decided to withdraw the notice issued to Mrs Archer. Please note that the notice is withdrawn without prejudice to HMRCs position that Mrs. Archer is liable to tax in respect of her involvement in the Certificates of Deposit scheme…"

20. On the following day, the 23rd December 2014, HMRC duly withdrew the APN issued to the Appellant. That same day HMRC filed and served summary grounds of Defence addressing the claim of Mr Archer alone.

C. Accelerated Payment Notices (APN)

21. It is appropriate to describe the system applicable to APNs under the FA 2014.

22. A power was conferred by the FA 2014 upon HMRC to issue APNs: see sections 219 and 220 FA 2014. When an APN is issued to a taxpayer the accompanying notice specifies an amount payable in respect of a specified tax year. The taxpayer is required to pay the amount specified within 90 days of issuance of the notice notwithstanding that there may be an ongoing inquiry into the tax year or an ongoing appeal to the First-tier Tribunal or other courts relating to the tax in question. By use of an APN, HMRC compels payment in advance of final resolution of the taxable amount. Under the legislation a payment made pursuant to an APN is treated as a payment on account of tax. If the sum paid exceeds the tax ultimately determined, then repayment of the difference is made together with interest.

23. A taxpayer who objects to the sums demanded in an APN may make representations to HMRC under section 222 FA 2014:

222 Representations about a notice

(1) This section applies where an accelerated payment notice has been given under
section 219 (and not withdrawn).

(2) P has 90 days beginning with the day that notice is given to send written representations to HMRC—

(a) objecting to the notice on the grounds that Condition A, B or C in section 219 was not met, or

(b) objecting to the amount specified in the notice under section 220(2)(b)
or section 221(2)(b).

(3) HMRC must consider any representations made in accordance with subsection (2).

(4) Having considered the representations, HMRC must—

(a) if representations were made under subsection (2)(a), determine whether—

(i) to confirm the accelerated payment notice (with or without amendment), or

(ii) to withdraw the accelerated payment notice, and

(b) if representations were made under subsection (2)(b) (and the notice is not withdrawn under paragraph (a)), determine whether a different amount ought to have been specified under section 220(2)(b) or section 221(2)(b), and then—

(i) confirm the amount specified in the notice, or

(ii) amend the notice to specify a different amount, and notify P accordingly.

24. The basis upon which representations can be made are set out in section 222(2)(a) and/or (b). If representations are made it is the duty (cf "*must*" in section 222 (3) and (4)) of HMRC to both consider those representations and then to decide whether to confirm or withdraw the APN and/or to determine whether a different "*amount*" of tax is due. There is no fixed time period within which HMRC must respond to representations, but there is no dispute to the general proposition that HMRC must respond within a *reasonable* period of time, though what will be reasonable will of course be highly fact and context specific.

25. If representations are made, then under section 223 FA 2014 the APN is in effect put into stasis pending the determination of HMRC (under section 222). This provides that when an APN is issued the taxpayer must make payment before the end of the "*payment period*". This term is defined in section 223(5) as follows:

(5) "The payment period" means—

(a) if P made no representations under section 222, the period of 90 days beginning with the day on which the accelerated payment notice is given, and

(b) if P made such representations, whichever of the following periods ends later—

(i) the 90 day period mentioned in paragraph (a);

(ii) the period of 30 days beginning with the day on which P is notified under section 222 of HMRC's determination.

26. Accordingly, if representations are made the obligation to make payment is engaged only 30 days following the "*determination*" of HMRC and given that there is no express time limit within which HMRC must make the determination the point in time at which payment must be made is at large.

27. There is no right of statutory appeal (for instance to the specialist Tribunal) under the FA 2014 against an APN, even following the representation and review procedure set out in section 222. It is of course possible for the taxpayer to require HMRC to issue a Closure Notice and then to appeal that Notice to the First-tier Tribunal. But, as Mr McDonnell for the Appellant pointed out in argument, it can be years following payment (under the APN) before the Closure Notice is issued and although it is true that ultimately everything might come out in the wash (following the judgment of the Tribunal) the real issue in these cases is the loss of liquidity *pro tem*. It is accepted on all sides that, in principle, judicial review lies against an APN.

28. The nature, extent and legality of the APN system has now been considered by the courts upon a number of occasions: see *R (Rowe) v HMRC* [2015] EWHC 2293 (Admin) ("*Rowe*"); *R (Walapu) v HMRC* [2016] EWHC 658 (Admin) ("*Walapu*"); *R (Vital Nut) v HMRC* [2016] EWHC 1797 (Admin) ("*Vital Nut*"); and, *R (Dickinson) v HMRC* [2017] EWHC 1705 (Admin) ("*Dickinson*"). A similar regime for countering tax avoidance also requiring payments on account of tax (under the Finance Act 2015 ("FA 2015")) was considered by the High Court in *R (Glencore Energy UK Limited) v HMRC* [2017] EWHC 1476 (Admin); approved by the Court of Appeal: [2017] EWCA Civ 1716 ("*Glencore").*

29. The core of the challenges in *Rowe* and in *Walapu* were on general public law grounds including the incompatibility of the APN system under the Human Rights Act 1988, breach of the principle of legitimate expectation, and, alleged breach of the principles of natural justice and fairness. There was an additional argument in *Walapu* on more traditional grounds that the syndicate scheme in issue was not notifiable under the Finance Act 2004 and/or the DOTAS Regulations 2006 and as such there was no power on the part of HMRC to issue the APN: *ibid* paragraphs [123ff]. All of the judicial reviews identified above were unsuccessful. The decision in *Rowe* was considered by the Court of Appeal ([2017] EWCA Civ 2105) and in so doing the Court also addressed the decision in *Walapu*. The Court of Appeal upheld the High Court in *Rowe* and, indirectly, *Walapu*. I return to these judgments below.

D. <u>The Appellant's claim for costs</u>

30. In the present case the gist of at least one part of the claim for judicial review was that HMRC could not genuinely or rationally have determined that £6,000,000 of tax was properly payable by both Mr and Mrs Archer since HMRC had, at all material times, accepted that the £6,000,000 was to be paid by one or other but not both of them. There is some dispute between the parties as to how the Appellants arguments should be described or formulated and in particular whether they could *all*, sensibly, be squeezed into the section 222(2)(a) and (b) categories of matters about which representations could be made. Mr Yates for HMRC argued that everything of any materiality or substance was readily capable of fitting within section 222; Mr McDonnell argued that there were additional arguments of a "*holistic*" nature (in particular about the analysis of inter-spousal arrangements) which were issues of principle which fell outside of the section 222 rubric.

31. I address this issue below (see paragraphs [45] – [52] below). Regardless however of how the arguments are to be classified for section 222 purposes it is clear that HMRC did, in substance, concede the merits of Mrs Archer's arguments and accordingly withdrew the APN. In view of the withdrawal the Appellant sought her costs up to and including 23rd December 2014. This was upon the basis that the claim for judicial review had succeeded, HMRC *qua* decision maker having withdrawn the contested decision. It was (and remains) the Appellants case that although there has been no admission of unlawful conduct on the part of HMRC the only sensible interpretation of the facts is that HMRC acknowledged that it had acted unlawfully.

E. The Decision of Master Gidden

32. The costs incurred in the initial stage of preparing and issuing judicial review proceedings on behalf of Mr and Mrs Archer exceeded £500,000. The present appeal is concerned only with the Appellants claim for costs which exceed £265,000.

33. Upon the application for costs the Master concluded that, *prima facie*, the Appellant was entitled to her costs in line with *M v London Borough of Croydon* [2012] EWCA Civ 595. There is no dispute in this appeal about that particular conclusion. The question which then followed was whether there was good reason to make a different order. The Master concluded that there was:

> "The Defendant argues that the issue of proceedings for judicial review was premature because representations in response to the APN were not forthcoming until almost three weeks after the issue of the claim. As the effect of these was to require the Defendant to either confirm or withdraw the APN the submission of representations was therefore a clear alternative step for the Claimant and one which had not been taken at the time the claim was issued. The Claimant disagrees but no clear explanation for this has been given other than submissions which suggest the claimant's had limited confidence in the process of representations as an alternative remedy. However, it is significant that these submissions do appear to accept that only after consideration of representations and a decision by the defendant to confirm or withdraw the APN could judicial review be "the only form of legal redress" i.e. a remedy of last resort.

> On balance I am not persuaded that the issue of a claim at the material time was justified. The claimants point to a desire to act promptly but this virtue by itself did not override all other considerations and whether a claim for judicial review was at this stage truly a last resort, as it should be, is of course a matter of judgment and one to be reached taking into account all of the circumstances. On any objective analysis it would seem that there was at the point of issue a very significant potential for the situation to be resolved without the additional upheaval of costly proceedings; an alternative course to litigation had still to be played out as events in the following three weeks swiftly demonstrated. By this time the dispute had been running many years and the relationship between what were clearly two very well-resourced parties was a well-established one. Progress between them was clearly ongoing and at an advanced stage as both parties must have realised. In this context the lawyers involved were under a heavy obligation to resort to litigation only if it was really unavoidable."

F. <u>Parties submissions</u>

34. Mr Yates, for HMRC, argued that this reasoning contains two different bases for the judgment. The first is that the Master refused the Appellant her costs in condemnation of the Appellant's litigation conduct. He points out that the Master used the expression "*On balance I am not persuaded that the issue of a claim at the material time was justified*". Mr Yates argued that since the decision of the Master was in essence based upon the exercise of judgment I should, in this an appellate forum, show considerable reticence and restraint in interfering. The second basis was the point of principle about the procedure under section 222 amounting to an adequate alternative remedy which should have been exploited before any claim for judicial review was launched. As to this Mr Yates argued that in essence the judge was also correct.

35. Mr McDonnell for his part argued that the appeal turns upon a narrow point of principle centring upon the Master's conclusion that the Claim was premature. If the Master was wrong, then his client was entitled to her costs (to be assessed). In his helpful skeleton argument Mr McDonnell argued that: "*The real issue in this cost appeal is whether [the Appellant] had an alternative to judicial review proceedings, at the time she issued the Claim Form."* In oral submissions he argued that the conclusion that the Claim was premature because of section 222 was incorrect and failed to take account of the fact that the section 222 procedure had many inherent limitations: the review was entirely optional and not a mandatory part of the assessment system; the subject matter of representations was statutorily limited; there was no duty on HMRC to accede to arguments, even if compelling; HMRC was neither impartial nor independent in its own cause and was inherently likely to uphold its own prior assessment and conclusions; there was no time limit governing any new decision by HMRC; and the procedure was not linked to any immediate right of statutory appeal. Mr McDonnell argued that in consequence it was entirely appropriate for the Appellant to have issued the Claim Form as a protective measure. There could be no certainty that if she had awaited the outcome of the section 222

procedure that HMRC (or even a court of its own motion) might not say that there had been fatal delay and that it was inappropriate to exercise discretion in favour of allowing the claim to proceed. As a matter of practice issuing the Claim Form and then seeking a consensual stay pending a section 222 procedure was the sensible and pragmatic course and was in accordance with established practice and case law.

36. In support of this analysis Mr McDonnell drew my attention to and placed considerable reliance upon the judgment of Hickinbottom J (as he then was) in *Zahid v University of Manchester et ors* [2017] EWHC 188 (Admin) which he said was analogous and described a process which was directly relevant to the present case. In that case a student had a complaint against her higher educational institution ("HEI"). She had exhausted the internal complaints mechanism of that HEI. She could have commenced legal proceedings, but she also had the right to refer the matter to the Office of the Independent Adjudicator for Higher Education ("the OIA"). This operates as a students' complaints scheme and it can review the complaint and determine whether it is wholly or partly justified. If justified, the OIA can make appropriate recommendations to the relevant HEI. But there is no right to take binding decisions. The Claimant made a reference to the OIA but also sought judicial review of the impugned decision of the HEI. The Claimant sought a stay of the judicial review proceedings to allow the reference to the OIA to run its course upon the basis that the OIA outcome might make the claim redundant. A stay was of importance because, where there were court proceedings in relation to the same subject matter that were not stayed, the OIA was proscribed from considering a complaint. The issue was whether there should be a stay. Mr McDonnell relied upon the following passage from the judgment:

> "44. … in the exercise of its supervisory jurisdiction, while this court is willing to exercise temporary restraint to encourage ADR, it is only usually unwilling to entertain a judicial review challenge at all where the alternative procedure is intended to exclude that jurisdiction altogether, e.g. where there is a right of appeal. It is clear that that is not the intention of this statutory scheme, which expressly envisages both procedures being applied, in order, to the same subject matter …".

37. At paragraphs [45] – [49] the Judge stated as follows:

> "45. The OIA scheme and court proceedings thus respectively offer advantages and disadvantages to a student who is dissatisfied with his or her treatment by an HEI. As Parliament specifically intended, and as a result of the characteristics I have identified, the former offers an attractive alternative to formal legal proceedings; but, although its findings and decision may give pointers to its view on the formal legal position, it does not and cannot determine legal rights and obligations. The latter offers a forum for the resolution of issues in relation to formal legal rights and obligations, but at some considerable cost, not only in terms of money but also publicity and lack of flexibility in terms of both process and remedies. As Mummery LJ succinctly put it in Maxwell (at [37]):

> "The new processes have the advantage of being able to produce outcomes that are more flexible, constructive and acceptable to both sides than the all-or-nothing results of unaffordable contests in courts of law."

46. Because of the advantages of the OIA scheme, most students who have unsatisfied complaints against an HEI at which they have been studying refer the matter to the OIA, and do not wish to pursue legal proceedings. The OIA receives about 2,000 complaints per year.

47. However, some students do wish to pursue a legal claim. For example, some are intent on establishing the fact that the HEI has been guilty of unlawful discrimination against them, and wish to have a legal determination to that effect. Others wish to pursue legal remedies, but only if and when reference to the OIA does not result in an outcome acceptable to them. Such students issue proceedings instead of, or as well as, referring the matter to the OIA; or at least wish to preserve and protect their position on proceeding in the court, dependent upon the result of the OIA reference.

48. Where the OIA has concluded its investigation – and has reported and made any appropriate recommendations or suggestions to the HEI – because it is not obliged to make specific factual findings and it is no part of its function to determine rights and obligations, whatever its conclusions may be, subject to relevant time limits, the student has the right to apply to the court for relief on the basis of his or her strict legal rights as determined on the basis of the facts as found by the court. However:

> i) Unless the student has issued protective proceedings, it is likely that any claim for judicial review will be outside the three-month time limit for issue of proceedings, and will be dependent upon the court exercising its discretion to extend that time (see paragraph 16 above).
>
> ii) Because of the OIA's particular experience and expertise in HEI complaints, the court, although not bound, will give some deference to any findings made and conclusions drawn by the OIA. The degree of deference given will, of course, depend upon the circumstances of the particular case. Where findings and conclusions have been drawn by the OIA on the same evidence as is available to the court, then considerable deference may be appropriate; but less so where the evidence before the court is different from

> that lodged with the OIA, or has been more rigorously tested through the court process.
>
> 49. Although the functions of the OIA and the courts are conceptually and legally distinct, the OIA procedure may make court proceedings unnecessary in practice, as it is designed to do, because, even when the student is otherwise intent on pursuing legal proceedings, it may result in a recommendation accepted and implemented by the HEI which represents an acceptable outcome for the student, e.g. where a student who has been expelled from a course is reinstated. Therefore, although resolving disputes in a different way, the OIA procedure is ADR properly so called."

38. At paragraph [52] the Judge said as follows:

> "However, in addition to recourse to this court, an individual affected by such a decision may have other avenues of redress. The availability of an alternative forum and so a potential alternative remedy – and the nature of that remedy – may have a substantial effect on the exercise of the court's discretion in these circumstances. I should emphasise that the availability of a such a potential alternative remedy does not – indeed, cannot – exclude the supervisory jurisdiction of the court; but there are circumstances in which the availability of an alternative course will result in the court exercising restraint in the exercise of that jurisdiction, notably when considering whether the court should accept and hear the claim (i.e. prior to, or no later than at, the permission stage), but also when considering relief if unlawfulness is proved. In either event, there is no hard-edged question concerning jurisdiction, but rather the exercise of discretion on the basis of the circumstances of the particular case. In deciding whether to exercise restraint in the face of an alternative remedy, the court will consider the potential for the alternative to provide a means of redress, taking into account relative convenience, expedition, cost and effectiveness; and exercise its judgment to determine whether the alternative remedy is more suitable, so that the court proceedings should be dismissed, or at least stayed, to allow it to proceed to a conclusion."

39. It is argued that similar considerations of policy apply in the present case as applied in *Zahid*. Flexibility was the order of the day. Judicial review and ADR type procedures could happily coincide. Mr McDonnell's argument was that the Master failed to acknowledge or apply such principles and he therefore erred in a manner pivotal to his decision not to award costs to the Appellant.

F Analysis and Conclusion

40. In my judgment the Master did not err in his conclusion that the right to make representations pursuant to section 222 FA 2014 was an appropriate alternative remedy which the taxpayer could (and should) exhaust before bringing judicial review proceedings. There are a number of reasons for this.

Section 222 is part of a single composite procedure for determining the APN amount

41. First, whether a statutory procedure is capable of amounting to an adequate alternative remedy involves the analysis of a variety of factors. These are summarised in paragraphs [53] - [54] of the High Court in *Glencore.* The Court there emphasised the importance of recognising the integrity of procedures adopted by Parliament for resolving disputes. The point was reinforced in the Court of Appeal: See eg paragraph [55] per Sales LJ. In my view the section 222 procedure is intended by Parliament to serve as an integral part of the task of HMRC in coming to a final conclusion on the sum to be paid on account under the APN procedure. Before that composite procedure has been completed the sum to be paid is a moving target. As a matter of policy, it is desirable for any sum that is put into dispute be the final sum determined by HMRC, and not a sum that might only be a staging post along the way to the final sum. In essence: (i) the system creates a statutory framework whereby in the APN HMRC must set out the basis of its calculation; (ii) the system recognises that the issuance of an APN might leave outstanding unresolved issues of liability and/or quantum; (iii) the right to make representations is a statutory right conferred by Parliament designed to reflect the potentially uncertain nature of the APN amount; (iv) under section 222 in the light of the APN and the information contained therein the tax payer can therefore continue a dialogue with HMRC in order to arrive at a definitive liability by triggering representations; (v) Parliament has imposed a duty on HMRC to respond by confirming or changing the APN (and although not set out expressly this must be done within a reasonable time period); (vi) the system as a whole is intended to act as a protection for the taxpayer who must otherwise pay the sum specified in the APN on account but, because of section 223 who can avoid payment pending a determination of issues raised in the representations.

42. Standing back, Parliament created a composite two-part procedure for advance payment designed, at the end of the procedure, to create a basis for a payment on account which ensures that all of a taxpayer's representations have been taken into account. It is inherent in the procedure that the figure specified in the initial APN might be incorrect, it amounting only to the best assessment of HMRC arrived at following diligent effort. But it might *still* need correction or refinement hence the conferment of the right of representation which acts as the second stage in the process and serves to suspend the payment obligation in the APN pending the final determination at which point Parliament has stipulated that the tax payer must make a payment on account of tax. That is not however the end of the matter; the taxpayer can still require HMRC to issue a Closure Notice and this can then be made the subject of a statutory appeal to the First-tier Tribunal. Nonetheless following a determination on representations concerning an APN the taxpayer must pay now and sue later. In my judgment *prima facie* (see below at paragraph [62]) Parliament intends the tax payers exhaust the section 222 procedure before seeking to claim judicial review.

Advantages and disadvantages

43. Second, it seems to me that there are signal advantages in this being the position. Both Mr McDonnell and Mr Yates advanced arguments on the relative benefits and dis-benefits of this outcome. Despite the forensic creativity of Mr McDonnell, I prefer the arguments of Mr Yates. Until completion of the section 222 procedure the figure to be paid on account is inchoate. A claim for judicial review advanced before the section 222 procedure is completed is aimed at a figure and associated reasoning which might well become stale in short order. Why should HMRC be compelled to litigate (with attendant expenditure of costs and time) arguments that may rapidly become irrelevant? Why should the Court's scarce resources be deployed upon what might be an academic exercise? Mr McDonnell recognised this and argued that the solution lay in allowing the taxpayer to commence proceedings but then seek to stay the proceedings pending the section 222 procedure (following the guidance in *Zahid* (ibid)). This in my view is a cumbersome answer. It encourages litigation and expenditure of costs, and quite possibly for no good reason. I do not consider that the position carefully analysed by Hickinbottom J in *Zahid* is comparable. There are a host of differences between the position of a taxpayer subject to an APN because of suspected tax avoidance and the situation of students who having exhausted their internal HEI complaints procedure then invoke a quite separate non-judicial (ADR style) AIO procedure which is always contemplated as being capable of running in tandem with judicial proceedings. The systems described in that judgment are quite distinct from the composite two-part procedure arising in this case.

Risk to legal certainty?

44. Third, Mr McDonnell raised legal certainty: Unless the tax payer could issue proceedings upon receipt of the first APN there was no certainty that time limits would be complied with and observed and, if that was so, then the taxpayer lay at the mercy of judicial discretion to extend time. There is some force in this argument; legal certainty is very important. But the concern falls away if the position is made clear that: (i) ordinarily the tax payer should await the outcome of the section 222 procedure so that the final position was known before applying for permission; and (ii), HMRC could not ordinarily argue that any such application for permission to apply for judicial review was tardy or late or out of time; and (iii), in the (most unlikely) event that a court was nonetheless called upon to exercise its discretion to extend time that it should ordinarily do so. In my judgment these three points serve to extract the sting from the legal certainty complaint.

The scope of representations

45. Fourth, Mr McDonnell argued that judicial review should not be made subject to the section 222 representation procedure because the latter was a circumscribed procedure which excluded all sorts of arguments that a tax payer might wish to advance but could not. It would be wrong to delay and defer judicial review in such circumstances. The force of this argument is contingent upon the underlying premise viz., that the right of representation in section 222 is limited. In my judgment this underlying premise is not justified.

46. In *Walapu* the Court rejected a similar argument (ibid paragraph [75]) that the scope of the right of representation was overly narrow. The court rejected this argument as being "*highly abstract*" and not an argument backed up with evidence. At paragraphs

[66ff] the Court also considered an argument that the procedure for the making of representations pursuant to section 222 FA 2014 infringed common law principles of natural justice and fairness. At paragraph [68] the Court emphasised that HMRC was under a duty to respond to representations:

> "According to this scheme the addressee could make representation about all of the matters which go to the computation of the tax… and all matters going to quantum. The Revenue has a duty to consider such matters. And then the Revenue is under a duty whether to determine whether to confirm the APN or amend it or withdraw it."

47. The Court also cited with approval the judgment of Mrs Justice Simler in *Rowe* (at paragraph [65]) which emphasised the breadth of the right of representation accorded by section 222 which, in her view, was sufficiently all encompassing to include the rationality of the designated officer's determination both as to the efficacy of the tax avoidance arrangements and as to the amount.

48. In *Rowe* in the Court of Appeal Lady Justice Arden also adopted a wide construction of the right of representation (in effect endorsing the analysis of Mrs Justice Simler). At paragraph [67] she stated:

> "As I see it, Parliament has taken the view that the new powers to exact accelerated payments should only be available if the designated officer forms the view that the tax scheme does not work having diligently weighed up to the appropriate extent all the information available and not before, and the designated officer has no reason to doubt that information."

Later at paragraphs [110] – [113] she observed:

> "110. HMRC's position is that the duty of fairness is satisfied by giving the taxpayer the right to make representations on the amount of any APN/PPN. In general, on HMRC's submission, the duty of fairness only requires a person affected by the decision to have the right to make representation on the matters actually decided, which in this case excludes the question whether the scheme is effective. But it is implicit in the decision that HMRC has a case which as a public body it can properly pursue at that stage and so in my judgment the duty to act fairly means that the taxpayer must have the right to make representations at that level. "
>
> 111. The crucial question is whether the taxpayer can make representations on the question of effectiveness. In my judgment, the duty of fairness requires that he can do so since I have concluded that it is the designated officer's obligation to form a view on this (on the information available to him) before an APN/PPN can be issued. As I see it, the FA 2014

> does not say that a taxpayer cannot make any further representations, and, when Parliament limits the designated officer's knowledge base to the best of his information and belief, it does not say that the information can only be provided by HMRC. In those circumstances, it seems to me that it must follow that a taxpayer can provide further representations on this point although the designated officer, of course, must reach his own view and is not bound to accept the contentions made by the taxpayer.
>
> 112. The appellants contend that HMRC should have explained the basis of their liability. This must in principle follow from the fact that in my judgment they are entitled to make representations on the question whether their scheme was effective for tax purposes. However, I do not accept that the appellants were in doubt about the basis on which HMRC did not accept that that was so in their cases. In Rowe the appellants know the nature of HMRC's case as their cases have reached the stage of appeal proceedings. In the case of Vital Nut also, HMRC had already given a warning through Spotlight 6 and there could be no doubt thereafter as to HMRC's opinion on the effectiveness of the scheme in question.
>
> 113. Contrary to a submission by Ms Simor, I do not consider that the exercise of considering representations from taxpayers and deciding to issue a PPN/APN can be dismissed as a "tick box exercise" simply because HMRC decides on a rational basis to proceed to issue an APN/PPN despite having received submissions on the merits of the scheme."

49. It is also relevant to place the statutory right of representation into the more general context of how HMRC perceives its common law duty to respond to submissions and representations made to it. In *Glencore*, the taxpayer argued that the mandatory statutory review period (in section 101 FA 2015) was, as a matter of law, constrained and did not include questions as to liability to tax, as opposed to the quantum of any tax payable. HMRC disputed this construction but also argued that even were it to be correct it nonetheless had a free-standing obligation to consider formal submissions from the taxpayer about liability to tax. The formal statement submitted by HMRC is recorded in full in paragraph [103] of the judgment of the High Court. The first part of the statement was in the following terms: "*HMRC considers itself always under an obligation to consider formal submissions from a taxpayer about the liability to tax. HMRC considers itself always under an obligation to consider formal submissions from a taxpayer about the liability to tax. HMRC is subject to a number of internal and external standards of conduct. HMRC has to act with integrity, fairly, objectively, promptly, and to rectify mistakes. HMRC operates an internal complaints-handling process and is subject to supervision by several external bodies. HMRC accepts its duty to fulfil its statutory functions to a high standard. This duty exists regardless of whether on a particular occasion a person may have an actionable claim for judicial review. HMRC cannot simply ignore correspondence*".

50. I would observe that in any event under section 222 the taxpayer can submit "*representations to HMRC … objecting to the amount specified in the notice".* Errors in the maths deployed could lead to representations objecting to the "*amount*" but I can see no reason why other, non-computational, matters which bear upon "*amount*" to be paid should not *also* be the subject matter of representations. Parliament has defined the subject matter of the representation by reference to the end result (viz., the amount) and not by the facts which lead up to the amount being determined. Mathematical errors are only one instance of facts which might result in the "*amount*" having to be altered. I would adopt a broad interpretation of "*amount*" applying the purposive approach adopted in *Glencore*.

51. My conclusion on this is therefore that section 222 must be construed broadly and it should be rare that any representation made by a tax payer about the APN could fall outside of the ambit of that provision. But if it did then section 222 is supplemented by the broader common law and HMRCs general acceptance in *Glencore* that it should deal in good faith with proper representations made to it by taxpayers. Insofar as there is any daylight between section 222 and the arguments a taxpayer wishes to advance HMRC's general position should plug that lacuna.

52. In short, the objection that the right of representation is limited is more apparent than real. I do not consider that it is a good reason to conclude that the section 222 procedure is inapt as an alternative to judicial review.

Guidance from the judgments in Glencore

53. Fifth, I address the guidance that is available from the judgments in *Glenore*, which Mr Yates, for HMRC relied upon. The specific issue whether a tax payer was required to exhaust a statutory review period prior to commencing proceedings for judicial review was considered in that case. It concerned the issuance of a Charging Notice purportedly in accordance with section 95 FA 2015. The notice imposed a charge for Diverted Profits Tax ("DPT"). Pursuant to sections 101 and 102 FA 2015 where a charging notice is issued to a company for an accounting period a Designated Officer of HMRC is under a statutory duty to conduct a review of the amount of DPT charged for the accounting period. Such an officer is empowered to conduct more than one review. If the review does not lead to a satisfactory outcome for the taxpayer then there is a statutory appeal to the First-tier Tribunal. There are some significant differences between the procedure in the FA 2105 and section 222 FA 2015: (i) in *Glencore* there was an automatic statutory right of review which followed issuance of the notice to pay whereas under section 222 the review is optional at the behest of the taxpayer; (ii) in *Glencore* the review was time limited and HMRC had to respond within a fixed period of time whereas in section 222 there is no time limit for a determination by HMRC; and (iii), in *Glenore* there was a statutory right of appeal to the First-tier Tribunal upon expiry of the review period whereas there is no equivalent immediate right of appeal under the FA 2014.

54. In *Glencore* the tax payer commenced judicial review proceedings <u>before</u> embarking upon the mandatory statutory review process under which the designated officer must review the amount of DPT charged within 12 months from the end of the 30-day payment period set out within the Charging Notice. The officer may issue an

amending notice reducing the DPT or issue a supplementary Charging Notice increasing the said tax. The issue was whether the application for permission to apply for judicial review should be dismissed upon the basis that the taxpayer had failed to exhaust the review procedure which was an adequate alternative remedy to judicial review. The analysis proceeded upon the basis that the grounds were otherwise arguable. The High Court held that the statutory review procedure was an adequate alternative remedy and the application for permission to apply for judicial review was dismissed upon that basis. In paragraphs [55] and [56] the Court stated as follows:

> "55. An issue arising is whether in principle section 101 FA 2015 is capable of amounting to an "alternative remedy". The Claimant observes that the review process is neither judicial nor independent (of HMRC). I consider that the review procedure is capable of amounting to an alternative remedy for the following reasons. First, the review process is designed to work in conjunction with the statutory appeal procedure. It is a compulsory (unavoidable) precursor to a right of appeal which can only be triggered upon expiry of the review process. In terms of Parliamentary intent, it is an integral part of the alternative remedy: Parliament has created the review process as a form of mandatory mediation or ADR prior to litigation. I consider that an important purpose behind section 101 is to narrow to the greatest possible degree evidential and legal disputes between the parties prior to the commencement of litigation. The review process could obviate the need for litigation entirely, or, if not, at least focus the issues in dispute which will enhance the efficiency (reducing costs and time) of the appeal and facilitate settlement. Second, the review process has been set by Parliament to work to a fixed timetable. It commences 30 days after the issuance of the Charging Notice and expires 12 months thereafter with the possibility of earlier termination in defined circumstances (cf. sections 101(2) and 98(2)). The duration of the process is not open ended; it reflects Parliament's judgment as to what is reasonable for the resolution of the sorts of issues that might arise in cases involving DPT. Third, section 101 imposes a duty on HMRC to engage in the review. Mr Grodzinski QC, for the Claimant, complained that it was not an exercise conducted by an independent party and could not therefore be impartial. In one sense he is correct but I do not accept that this is an answer. Although not express in the FA 2015, it is implicit (and in any event a duty imposed by the common law) that the process must be pursued in good faith by HMRC. The review process is a species of mandatory inter-partes mediation. HMRC is incentivised to act sensibly by the fact that otherwise it faces a statutory appeal within a short time frame. To criticise the process for not having the hallmarks of judicial of independence and impartiality is to miss the point of the exercise. Section 101 was never intended by Parliament to have those hallmarks. It is created as a more informal dispute

> resolution mechanism which takes account of the fact that the process leading up to the imposition of the Charging Notice was a "summary" procedure (to adopt Mr Brennan QC's terminology) which permitted the taxpayer to make representations in response to a Preliminary Notice only on limited and constrained grounds. I endorse the observation of Lord Justice More-Bick in Wilford (see paragraph [52] above) that it is important to bear in mind Parliament's intent.
>
> 56. More broadly, non-judicial alternatives can suffice as an adequate and effective alternative remedy. A review of the case law is set out in De Smith's Judicial Review (7th ed.) at paragraph [16-21]. Case law shows that the following have been treated as alternatives: a statutory complaints procedure; an express right to make objections to a Minister proposing to issue a penalty; the possibility of bringing a private prosecution; and the ability to make a request to a Minister to exercise default powers."

55. The statutory review process was an adequate alternative regardless of the fact that there was, in addition, a statutory appeal to a specialist tribunal following expiry of the statutory review period. The efficacy of the statutory review as an alternative was not contingent upon the existence of a subsequent right of appeal to a (specialist) judicial body: see ibid paragraphs [54c)] and generally [55]-[59], though of course the existence of the statutory appeal was an important factor for the conclusion that viewed overall the procedure laid down in the FA 2015 was an adequate alternative to judicial review.

56. The Court of Appeal rejected the appeal adopting similar policy consideration to that of the High Court. At paragraphs [54]- [57] Sales LJ stated:

> "54. In order to evaluate these submissions, it is necessary to consider the basis for the suitable alternative remedy principle. The principle does not apply as the result of any statutory provision to oust the jurisdiction of the High Court on judicial review. In this case the High Court (and hence this court) has full jurisdiction to review the lawfulness of action by the Designated Officer and by HMRC. The question is whether the court should exercise its discretion to refuse to proceed to judicial review (as the judge did at the permission stage) or to grant relief under judicial review at a substantive hearing according to the established principle governing the exercise of its discretion where there is a suitable alternative remedy.
>
> 55. In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there

without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure. But of course it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor.

56. Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required.

57. In my judgment the principle is applicable in the present tax context. The basic object of the tax regime is to ensure that tax is properly collected when it is due and the taxpayer is not otherwise obliged to pay sums to the state. The regime for appeals on the merits in tax cases is directed to securing that basic objective and is more effective than judicial review to do so: it ensures that a taxpayer is only ultimately liable to pay tax if the law says so, not because HMRC consider that it should. To allow judicial review to intrude alongside the appeal regime risks disrupting the smooth collection of tax and the efficient functioning of the appeal procedures in a way which is not warranted by the need to protect the fundamental interests of the taxpayer. Those interests are ordinarily sufficiently and appropriately protected by the appeal regime. Since the basic objective of the tax regime is the proper collection of tax which is due, which is directly served by application of the law to the facts on an appeal once the tax collection process has been

> initiated, the lawfulness of the approach adopted by HMRC when taking the decision to initiate the process is not of central concern. Moreover, by legislating for a full right of appeal on fact and law, Parliament contemplated that there will be cases where there might have been some error of law by HMRC at the initiation stage but also contemplates that the appropriate way to deal with that sort of problem will be by way of appeal."

Conclusion

57. I now pull the threads together. Mr Yates reminded me that the issue in this case was not permission to apply for judicial review but an appeal about costs. The nub of the issue was whether the Master erred. In my judgment based upon the analysis above he did not err. He was entitled on the facts of the case to conclude that the section 222 procedure was an adequate alternative remedy which should have been exhausted before a Claim Form was issued. In concluding also that it was open to the Appellant to require HMRC to confirm or withdraw the APN following the making of statutory representations the Master did not err. He was correct in his construction of section 222 which does impose a duty on HMRC to make a determination. He correctly concluded that the issuance of judicial review was not a remedy of last resort.

58. As to Mr Yate's argument that the Master was taking a decision limited to particular facts and expressing condemnation of the litigation conduct of Mrs Archer I am less convinced. The Masters reasoning is relatively brief (see paragraph [33] above). He focused upon the argument of HMRC that the claim was premature. He places this in its factual context pointing out that the section 222 representations made by the Appellant post-dated the Claim Form and he expressed the view (no doubt based upon the fact that the dispute was rapidly resolved) that the dispute between the parties was capable of being resolved *via* the section 222 procedure. In my view this reasoning is perfectly sound but it does assume that the section 222 procedure <u>is</u> an adequate alternative and if he had been wrong in this then it would follow that the pith and substance of his reasoning for awarding no costs was also flawed.

59. In my judgment it follows from all these reasons that the appeal fails.

Postscript

60. There are various points that I would mention by way of postscript. These relate to matters arising in argument and concern the possible implications which my ruling on this appeal against a costs decision might have on other cases where permission to apply for judicial review was in issue: See paragraph [4] above. If I am correct in the conclusion I have reached, that the section 222 procedure should be exhausted before a Claim Form is issued, then that conclusion will bear upon the points that I make below. Nonetheless, the scenarios described below do not reflect the facts of the present case and the application of the conclusions I have arrived can be considered in detail if, as and when, these scenarios do arise as live issues.

61. First, whilst the existence of the statutory right to make representations might generally amount to an adequate alternative remedy, this may not apply in *every* case. Judicial review will remain appropriate to deal with exceptional cases. Lord Justice Sales in the Court of Appeal in *Glencore* (cf paragraph [58]) gave by way of example the case where a Designated Officer had been bribed to issue a Charging Notice or did so in breach of an express promise not to issue such a notice which gave rise to an enforceable legitimate expectation for the taxpayer of a kind which could not be vindicated in a statutory appeal. He also said that judicial review might exist "*possibly*" if there was a clear failure by the Designated Officer, manifest on the face of Charging Notice, even to attempt to comply with the statutory requirements. These illustrations reflect the fact that judicial review is discretionary, and the Court will always allow proceedings if needed to ensure justice. Nothing in this judgment therefore should be taken to indicate that it will be in *every* case that a judicial review will be considered premature. Mr McDonnell pointed out that no one had argued in *Walapu*, *Rowe* and in the other related cases that the section 222 procedure was such that it rendered judicial review inapt in those cases. That is true. But there were a number of reasons for this. In *Walapu*, for instance, HMRC did not argue that the section 222 procedure would have been appropriate to address the high level human rights arguments which formed the core of the taxpayer's challenge. In that case the taxpayer did not shrink from seeking a declaration of incompatibility of the *entire* system for APNs under the FA 2014: See *Walapu* (ibid) paragraph [3]. Such an argument could not have sensibly been advanced through section 222 for the obvious reason that HMRC did not have the power to make such a declaration upon the back of which the obligation to make payment on account would have collapsed. More generally, the procedures Parliament is increasingly introducing into the taxing legislation to counter tax evasion, which include advance payment on account obligations coupled to procedural safeguards for the tax payer, are relatively new. The argument about prematurity came to the fore in *Glencore*. Even if the point was available to HMRC to take before, but it did not, the point is <u>now</u> squarely on the table and can be taken. Past practice is not an answer.

62. Second, I also express no view on what the position of the Court might be if a taxpayer decided not to invoke section 222 *at all* and after the chance to do so had lapsed *then* sought to challenge an APN in judicial review. On one view the logic of the above involving a deliberate decision not to invoke the alternative remedy might be that the taxpayer loses the right to challenge the APN and the obligation to make payment on account by way of judicial review. A tax payer wishing to challenge the obligation to pay tax would then have to move through the statutory procedure to the issuance of a Closure Notice and then launch a statutory appeal therefrom. There is some force in this argument but Mr Yates did not wish to pin HMRC to this position and it does not arise on the facts of the present case (since representations were in fact made and HMRC did withdraw the impugned APN). It is an argument for another day.

63. Third, I am also not expressing a concluded view on how a court should react if a taxpayer *does* issue a protective Claim Form and then pursues the section 222 procedure having sought a stay of the proceedings. If HMRC objects to a stay arguing that instead the claim should be dismissed should the Court dismiss the Claim as premature or allow it to remain? On one view if the Claim is premature as I have found then the logic of that analysis is that it <u>should</u> be dismissed. But in the exercise

of discretion might a Court conceivably permit the Claim form to subsist (albeit stayed) and then visit any adverse consequences flowing from prematurity upon the Claimant in costs (eg if the Claim is revived making the Claimant pay the costs of amendments; and if the Claim is dismissed making the Claimant pay all of the costs or (as here) making no order for costs)? In the present case the Claim Form was not dismissed upon the basis of prematurity (as in *Glencore)* but the adverse consequences of being premature have been visited in part on the Claimant by the order that there be no order for costs. Once again the analysis of this is for another day since the issue of how the court should respond if HMRC applied to have the Claim Form dismissed did not arise in this case.